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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY L. CURTIS,

Defendant and Appellant.

B216858

(Los Angeles County
Super. Ct. No. YA031738)

THE COURT:*

Tony L. Curtis (appellant) appeals from the trial court's denial of his motion claiming an exemption for the property levied upon to satisfy a victim restitution order and a stay of execution of the restitution order pending appeal. We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "opening brief" containing an acknowledgment that he had been unable to find any arguable issues.

On August 24, 2009, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. On September 28, 2009, appellant filed a brief alleging that there were omissions and errors

* BOREN, P. J., DOI TODD, J., CHAVEZ, J.

in appointed counsel's statement of the case and setting forth the following grounds of appeal: (1) whether appellant was entitled to a stay of execution until appropriate enforcement proceedings occurred and officials followed procedures for collection of a money judgment; (2) whether the property being levied upon was exempt pursuant to the Code of Civil Procedure section 704.090¹ and whether the Department of Corrections and Rehabilitation (the Department) should be ordered to release the property upon which an improper levy was executed; (3) whether the trial court abused its discretion by failing to afford appellant a hearing within 20 days pursuant to section 703.570 and for failing to grant a stay of execution pending appeal; (4) given the enforcement of restitution orders as civil judgments, whether prison officials' failure to comply with the civil procedures of enforcement of the restitution order deprived appellant of procedural due process; and (5) whether this court can grant appellant any relief.

The record shows that appellant was convicted of one count of attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)), an offense that left the victim comatose and paralyzed due to a brain injury. The jury also convicted appellant of one count of assault with a firearm on a second victim. (Pen. Code, § 245, subd. (a)(2)). The jury found true certain enhancements, including firearm-use enhancements. On June 9, 1998, the trial court imposed an aggregate sentence of 20 years. Appellant was ordered to pay a \$200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b) and victim restitution in the amount of \$225,592.20.

Appellant's judgment was modified pursuant to a decision filed by this court on November 29, 1999, which reduced appellant's sentence to 15 years. Due to clerical error, amendment of the abstract of judgment and modification of the sentence did not occur until March 17, 2009, when appellant was resentenced to an aggregate sentence of 15 years, and a parole revocation fine of \$200 was imposed and stayed pursuant to Penal

¹ All further references to statutes are to the Code of Civil Procedure unless stated otherwise.

Code section 1202.45. Appellant's original restitution fine and victim restitution order remained the same.

A minute order dated April 27, 2009, reflects the denial of a motion filed on April 12, 2009, by appellant. There is no copy of this motion in the record. The minute order states that the motion requested "exemption, stay of execution, and appointment of counsel." The trial court denied the motion for failure to provide a sufficient factual basis for relief. In his appeal from this decision, signed May 1, 2009, appellant reiterated the claims he made in the motion, which correspond to the first two issues in his supplemental brief.

Appellant filed a motion, signed May 1, 2009, for stay of execution pursuant to section 703.610 pending appeal of the April 27, 2009, denial of his motion. This motion was denied on May 7, 2009. This denial corresponds to appellant's third issue in his supplemental brief.

With respect to appellant's first issue, he is not entitled to a stay of execution of the restitution order under section 703.610. This section pertains only to claims of exemption of property in civil judgments. Although it is true that restitution orders may be enforced as civil judgments (Pen. Code, § 1202.4, subd. (a)(3)(B); subd. (f)), appellant, as a prisoner, is under the control of the Department. Under Penal Code section 2085.5, subdivision (b), when a prisoner owes a restitution order imposed pursuant to section 1202.4, subdivision (f), the Secretary of the Department is authorized to deduct a minimum of 20 percent or the balance owing of the restitution amount, up to a maximum of 50 percent, from a prisoner's wages and trust account deposits. Administrative fees are also authorized. (§ 2085.5, subd. (c).) The California Code of Regulations, title 15, section 3097, subsection (c), also authorizes the Department to deduct, in satisfaction of a direct order of restitution imposed by a court, "50 percent or the balance owing, whichever is less, from the inmate's wages and trust account deposits regardless of the source of such income, subject to the exemptions enumerated in

subsection (j).”² Both restitution fines and direct orders of restitution are to be collected by the Department from inmates as long as the inmates remain under the Department’s jurisdiction. (Cal. Code Regs., tit. 15, § 3097, subd. (h).) Therefore, since the victim of appellant’s crime is not obliged to collect his restitution monies in a civil judgment, appellant is not entitled to a stay of execution while waiting for the victim to obtain a writ of execution.

People v. Willie (2005) 133 Cal.App.4th 43 (*Willie*), upon which appellant relies, is distinguishable. Willie was sentenced to prison for sex crimes and ordered to pay a \$10,000 restitution fine and victim restitution. (*Id.* at p. 46.) During a search incident to his arrest, police had found \$12,000 in Willie’s motor home, and the police department held these funds during trial and thereafter. (*Ibid.* & fn. 1.) After sentencing, the district attorney’s office wanted Willie’s funds to be used to pay his restitution fine, but the police department would not release the funds without a court order. (*Ibid.*) The Victim Compensation Board eventually obtained a writ of execution of the restitution fine order and served a notice of levy on the police department and on Willie. (*Id.* at p. 47.) Willie filed an opposition to the writ of execution and, apparently, a claim of exemption. Thus we see that Willie’s case, unlike appellant’s, was dealt with in the civil arena due to the source of the funds that were levied upon and the fact that a writ of execution was filed in order to reach these funds.

With respect to appellant’s second issue, there is nothing in the record that shows that appellant’s property was exempt and therefore improperly levied upon. Appellant states that when he filed his April 12, 2008 motion, he provided an affidavit identifying the property he claimed as exempt in accordance with sections 703.520 and 708.450. This affidavit is not in the record. In his current brief, appellant asserts that the balance in his trust account was less than \$300 at the time officials collected the money to satisfy the restitution order, and that this amount of money is exempt from levy.

² The exemptions in subsection (j) refer to Joint Venture Program deposits, family visit funds, Temporary Community Leave funds, federal disability payments, veteran benefits, and reimbursements to inmate for failed purchases or property claims.

It is true that funds in the amount of \$300 held in an inmate's trust account are exempt from being levied upon and are to be held to the inmate's benefit. (§ 704.090.) This provision does not prevent the Department from making deductions to appellant's wages and trust account *deposits*, however. (*In re Betts* (1998) 62 Cal.App.4th 821, 824-825.) Subdivision (b) of section 704.090 "does not expand the exemption for funds held in an inmate's account to include moneys held to the credit of an inmate, but not yet placed in his account." (*Id.* at p. 824.) It may well be that the funds appellant believes he was entitled to keep were properly collected from appellant's wages or other amounts he wished to deposit, even though his trust account balance was less than \$300 at the time of collection. We have no evidence to the contrary.

In his third issue, appellant argues that the trial court abused its discretion by failing to grant him a hearing within 20 days under section 703.570.³ Section 703.570 pertains to hearings on motions made by judgment debtors to claim exemptions on property that has been levied upon. This procedure is pertinent only to civil judgments. As we have explained, appellant's victim did not file a civil judgment against appellant, and was not required to do so, in order to receive the restitution that appellant's trial court awarded him for his injuries. The trial court did not abuse its discretion for failing to grant appellant a stay of execution of payment of his victim restitution under section 703.610 either, since this section also pertains only to claims of exemption pending in civil proceedings, as occurred in *Willie*.

In light of the above authority we conclude appellant has suffered no violation of procedural due process, as he asserts in his fourth issue. We believe appellant's arguments are without merit, and he is not entitled to relief on this record (appellant's fifth issue). In addition, we have examined the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

³ The record shows that the trial court denied his motion without a hearing.

The judgment is affirmed.

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